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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GREENSTREET FINANCIAL, L.P., a
Delaware limited partnership,

Plaintiff,

-against-

1:07-cv-08005 (KNF)

CS-GRACES, LLC, a New York limited
liability company, RH LODGING SERVICES,
LLC, a New York limited liability company,
and ALAN FRIEDBERG,

Defendants.

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CS GRACES, LLC and RH LODGING
SERVICES, LLC,

Third-Party Plaintiffs,

-against-

SHERYL SMUL, SHERYL SMUL
GRANTOR ANNUITY TRUST and
ALAN G. FRIEDBERG,

Third-Party Defendants.

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**MOTION OF SHERYL SMUL AND THE SHERYL SMUL GRANTOR ANNUITY TRUST
FOR LEAVE TO IMPEAD AS FOURTH PARTY DEFENDANTS
STOLOFF & SILVER, LLP AND GARY D. SILVER**

TO: KENNETH NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Third Party Defendants Sheryl Smul and The Sheryl Smul Grantor Annuity Trust (the "Third Party Defendants") seek leave to implead the law firm of Stoloff & Silver, LLP and a partner in that firm, Gary D. Silver, Esq. as fourth party defendants herein, and in support of their motion show as follows.

1. By this motion, brought pursuant to Rule 14(a) of the Federal Rules of Civil Procedure, the Third Party Defendants seek leave to implead the law firm and the lawyer who represented them in connection with the transaction which is made the basis of the Third Party Complaint filed herein by CS-Graces, LLC ("CS-Graces") and RH Lodging Services, LLC ("RH Lodging") (the "Third Party Plaintiffs").

2. The claims asserted by Third Party Plaintiffs against the Smul Trust and Sheryl Smul as trustee, personally, arise in connection with the Agreement dated effective January 30, 2006 by and between the Smul Trust, CS-Graces and RH Lodging for the divestiture of the Smul Trust's 50% membership interest in RH Lodging and the transfer of that interest to CS-Graces (the "Divestiture Agreement").

3. The Smul Trust's membership interest in RH Lodging was, at all times pertinent to the Third Party Plaintiffs' claims herein, subject to a security interest in favor of lender Greenstreet Financial, L.P. ("Greenstreet"). Greenstreet is the Plaintiff in this action.

4. That security interest was perfected by Greenstreet's filing of a UCC-1 Financing Statement in the State of Florida, where Sheryl Smul is domiciled and where the Smul Trust is located, as required by and in accordance with Article 9 of the Uniform Commercial Code.

5. Third Party Plaintiffs allege that the parties to the Divestiture Agreement intended that the transfer of that interest was to have been free and clear of liens and encumbrances, including the security interest and claim of Greenstreet, despite the absence of any covenants, representations or warranties to that effect in the Divestiture Agreement.

6. Sheryl Smul, as trustee, and the Smul Trust have denied and continue to vigorously deny that the Divestiture Agreement called for the transfer of the Smul Trust's membership interest in RH Lodging free and clear of liens and encumbrances.

7. In the unlikely event, however, that liability should attach to Sheryl Smul, as trustee, on the Third Party Plaintiffs' contract theory¹, then and in that event Sheryl Smul and the Smul Trust seek indemnity over against Stoloff & Silver, LLP and Gary D. Silver for legal malpractice.

8. As more fully set out in the Memorandum of Law in support of this Motion, the trust declaration that established the Sheryl Smul Grantor Annuity Trust (the "Smul Trust") expressly provides that Sheryl Smul, as trustee, shall have no personal liability for claims arising from the businesses or investments that the Smul Trust owns or operates.

9. New York law permits the enforcement of such a limitation on a trustee's personal liability, provided that either (i) appropriate notice of the limitation on the trustee's liability is given to the contracting parties, or (ii) where the contract in question so states. (*See* Memorandum of Law.)

10. Stoloff & Silver, LLP, and Gary D. Silver, Esq., as the Smul Trust's and its trustee Sheryl Smul's lawyers, had a duty to ascertain the terms of the Smul Trust, and the express limitation on trustee Sheryl Smul's personal liability for Trust investments and activities that the Trust instrument sets forth.

11. Stoloff & Silver, LLP and Gary D. Silver, as the attorneys for the Smul Trust and for Sheryl Smul, as its trustee, owed a duty of care to both the Smul Trust and to Sheryl Smul to document the Divestiture Agreement transaction so as to preserve for trustee Sheryl Smul the protections

¹ Third Party Plaintiffs also allege fraud based on alleged, unspecified oral representations of Alan G. Friedberg and the alleged complicity in those allegations by Sheryl Smul and the Smul Trust. Ms. Smul and the Smul Trust vigorously deny those allegations, and have moved for summary judgment on those claims

against personal liability available to her under the terms of the Sheryl Smul Grantor Annuity Trust and the laws of New York.²

12. If Sheryl Smul, as trustee of the Smul Trust, should be held liable for breach of the Divestiture Agreement, any such liability would not have attached but for Stoloff & Silver, LLP's and Gary D. Silver's failure to exercise reasonable care to appropriately document the Divestiture Agreement transaction so that Sheryl Smul would have no exposure to personal liability in contract to the Third Party Plaintiffs.

13. Nonparties Stoloff & Silver, LLP and Gary D. Silver "may be liable for all or part of the claim[s] against" Sheryl Smul, as trustee of the Smul Trust.

14. A copy of the proposed Fourth Party Complaint setting forth the claim over for indemnity is annexed as Exhibit "A".

15. As set out in greater detail in the annexed proposed Fourth Party Complaint, this Court has diversity jurisdiction over Sheryl Smul's claim over (and the Smul Trust's identical claim on behalf of its trustee) against Stoloff & Silver, LLP and Gary D. Silver for indemnification.

16. Neither prejudice nor undue delay will result from granting leave to implead Stoloff & Silver, LLP and Gary D. Silver.

17. The impleader of Stoloff & Silver, LLP and Gary D. Silver in this action is therefore proper.

18. The Third Party Defendants have contemporaneously filed a Memorandum of Law in support of this motion, to which the Court is respectfully referred.

19. No prior request has been made for the relief requested in this motion.

² New York law applies to the construction of the Divestiture Agreement pursuant to the choice of law clause in that document. New York is the state where RH Lodging was formed and New York is the situs of RH Lodging's primary asset—the Lodge at Rock Hill.

WHEREFORE, Third Party Defendants Sheryl Smul and the Sheryl Smul Grantor Annuity Trust seek the entry of an order (i) granting leave to implead Stoloff & Silver, LLP and Gary D. Silver, Esq., as fourth party defendants, and (ii) for such other and further relief as is just and proper.

Dated: Goshen, New York
August 13, 2008

/s/ Mike Pinsky, Esq.
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